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State of New Jersey

DIVISION OF THE RATEPAYER ADVOCATE
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CHRISTINE TODD WHITMAN
Governor

May 4, 1998

BLOSSOM A. PERETZ, ESQ.
Ratepayer Advocate
and Director

VIA EXPRESS MAIL

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: New Jersey Division of the Ratepayer Advocate
Petition for Expedited Declaratory Ruling
DA 98-608

CC Docket No. 96-45
AAD/USB File No. 98-50

TO THE HONORABLE COMMISSION:

Enclosed please find an original and six copies of the Reply Comments submitted by the New Jersey Division of the Ratepayer Advocate to be filed with the Commission in the above-referenced matter. Please time/date stamp the additional copy and return it to the undersigned in the enclosed stamped envelope.

Respectfully submitted,

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cc: Sheryl Todd, Common Carrier Bureau (3 copies)
ITS (1 copy)
Service List (via First Class Mail)

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**Before the
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Washington, D.C.**

In the Matter of)
Federal State Joint Board on)
Universal Service)
The New Jersey Division of the)
Ratepayer Advocate)
Petition for Expedited)
Declaratory Ruling)

DA 98-608

CC Docket No. 96-45

AAD/USB File No. 98-50

MAY 5, 1998

REPLY COMMENTS IN OPPOSITION TO BELL ATLANTIC-NEW JERSEY, INC.

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May 4, 1998

INTRODUCTION

On March 30, 1998, the Federal Communications Commission (FCC) released its Public Notice (DA 98-608) seeking comment on the Petition for Expedited Declaratory Ruling (Petition) submitted to the FCC on March 18, 1998 by the New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate). This petition seeks a declaratory ruling from the FCC that: 1) certain discounted rates for services provided by Bell Atlantic-New Jersey (BA-NJ) to schools and libraries under its Access New Jersey program are not a "special regulatory subsidy," pursuant to the FCC's Fourth Order, and such rates constitute the "lowest corresponding price" (LCP) for purposes of calculating BA-NJ's reimbursement from the federal universal service fund; 2) the discounted rates offered by BA-NJ to schools and libraries under its Access New Jersey program do not preclude schools and libraries of this State from also obtaining benefits from the federal universal service fund; and 3) BA-NJ's plan to seek reimbursement from the federal universal service fund for the difference between discounted rates and tariff rates for services supplied to schools and libraries is contradictory to the FCC's ruling in its Fourth Order on Reconsideration of its Report and Order issued on universal service provisions.¹

Comments were received in support of the petition from AT&T, the New Jersey Cable Telecommunications Association (NJCTA) and the New Jersey Library Association (NJLA). The only comments received in opposition to the petition were from Bell Atlantic-New Jersey (BA-NJ), which are addressed in the reply comments submitted below. The FCC is urged to review the analysis which has been provided and promptly issue a ruling that BA-NJ's actions are in

¹ Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, Rel. Dec. 30, 1997)(hereinafter "Fourth Order")

contravention of the FCC's rulings on the operation of the federal universal service funding mechanism, as requested in the Petition.

An expeditious ruling from the FCC is requested since a decision upholding the position of the Petitioner will permit New Jersey schools and libraries that have been unable to receive benefits from both programs to file for Universal Service discounts with the initiation of the second cycle of filings with the Schools and Libraries Corporation (SLC), starting July 1, 1998. The unilateral decision of BA-NJ that it would consider federal universal service benefits and discounts under the Access New Jersey rates to be mutually exclusive, has resulted in confusion among the entire class of intended beneficiaries with many schools and libraries being unable to decide what course to pursue. This confusion is confirmed by the comments submitted by NJLA, where they noted that:

“[T]he matter . . . has caused great confusion among the library community as they tried to apply for the Federal Universal Service discounts. The Bell Atlantic website specifically indicated that libraries could obtain either the Access New Jersey discount or the Federal Universal Service discount. Many feared that they would not receive the FCC discounts if they applied improperly or if the fund did not have enough money. It seemed simpler to choose the Access New Jersey program.” (p.1)

Thus, BA-NJ's actions have prevented some schools and libraries from maximizing the benefits available to them. By permitting schools and libraries to apply for both programs, the cloud of uncertainty will be lifted and the greatest possible benefit for the greatest possible portion of our citizenry will be achieved.

The FCC is the proper forum for resolution of these issues

Bell Atlantic's portrayal of the Ratepayer Advocate's Petition as an attempt at forum shopping is wholly unreasonable and utterly unsupported by the record. The FCC is clearly the proper forum for this Petition, since it focuses on the application of the FCC's rulings in its Fourth Order on Reconsideration to certain discounted rates to schools and libraries under its Access New Jersey program. It is difficult to comprehend why a petition which centers on issues that are the subject of FCC rulings should be decided by any other party than the FCC. BA-NJ itself admitted that "[p]ortions of the Fourth Order bear on issues concerning Access New Jersey rates . . ."² The issues which are the subject of the petition are directly derived from the FCC's rulings in its Fourth Order on the discounts available to schools and libraries under the federal universal service fund. It was the FCC's specific ruling in its Fourth Order which provided the basis for this petition seeking that the Access New Jersey rates are not "special regulatory subsidies" and therefore constitute the lowest corresponding price (LCP), to be used for calculating discounts available to schools and libraries under the federal universal service fund. Despite this clear and unequivocal wording, BA-NJ continues to insist that Access New Jersey rates are not the LCP. Accordingly, the Ratepayer Advocate had no other choice but to address the issue squarely to the FCC and ask for a definitive ruling on the rates applicable to New Jersey's schools and libraries.

BA-NJ attempts to skew the history of these proceedings, but fails to acknowledge some

² BA-NJ Letter in Lieu of Brief, to James Nappi, Secretary, BPU, February 6, 1998, p.1 (See Petition, Attachment 4).

key factors. It was BA-NJ who, in August 1997, initially requested a ruling from the New Jersey Board of Public Utilities (Board) that its Access New Jersey rates not be considered the lowest corresponding price for purposes of determining the level of discounts available to eligible schools and libraries under the federal universal service fund. But BA-NJ fails to mention that at the same time, it also raised the very same issues with the FCC in its August 1997 filing in Opposition to Petitions for Reconsideration of the FCC's Report and Order on Universal Service³, which was subsequently rejected by the FCC in its Fourth Order ruling.⁴ Thus, if there has been any "forum shopping" it has been done by BA-NJ. The Ratepayer Advocate has merely responded to the various occurrences and the various forums where BA-NJ has sought to inject this issue.

Moreover, in October 1997, a joint letter was filed with the Board by BA-NJ and the Ratepayer Advocate in which the parties agreed that BA-NJ's petition would be decided by the Board in conjunction with the Board's examination of universal service issues in its generic local exchange proceeding. However, rather than allowing the Board to issue a ruling on this matter, BA-NJ acted unilaterally when it unilaterally incorrectly declared that its Access New Jersey rates were "special regulatory subsidies" and the Fourth Order allowed them to restrict schools and libraries that chose to receive service under Access New Jersey rates from also applying for

³ See Opposition of Bell Atlantic to Petitions for Reconsideration, In the Matter of the Federal State Joint Board on Universal Service, CC Docket No. 96-45, Filed August 18, 1997. (See Petition, Attachment 3).

⁴ Fourth Order at ¶ 141.

available discounts under the federal universal service program.⁵ Without any resolution of these pending issues, BA-NJ informed schools and libraries that they were prohibited from obtaining discounted service under both the Access New Jersey program and the federal universal service fund, causing undue confusion by requiring them to choose between the two programs, as noted in the comments from NJLA.

And while BA-NJ notes in its comments that states are required to adopt regulations to advance universal service, there was no action by the Board in this matter that required BA-NJ to prohibit schools and libraries from reaping the benefits of both the Access New Jersey program and the federal universal service fund. The FCC clearly indicated in its Fourth Order that the decision as to whether a certain rate was a "special regulatory subsidy" would be examined on a "case-by-case basis."⁶ This petition merely asks that the FCC do just that -- examine the issue of whether in this particular case BA-NJ's Access New Jersey rates are "special regulatory subsidies," rather than allow BA-NJ to impose its own judgement by fiat, and in the process, deny federal universal service funding to eligible New Jersey schools and libraries. This petition is properly before the FCC, and the Ratepayer Advocate urges the FCC to review the petition and issue a definitive ruling on the issues presented as quickly as possible.

⁵ BA-NJ Letter in Lieu of Brief, to James Nappi, Secretary, BPU, February 6, 1998, pp.1-2 (See Petition, Attachment 4).

⁶ Fourth Order at ¶141.

The Access New Jersey Rates are not a special regulatory subsidy

BA-NJ's argument that its Access New Jersey rates qualify as a "special regulatory subsidy" is flawed and should be rejected. As noted in the petition, the Access New Jersey rates, though discounted, are still in excess of their costs. BA-NJ admits in its comments that the rates for Access New Jersey services "covers its direct costs, but earns a lower margin than most other Bell Atlantic services offered in New Jersey."⁷ Clearly, by BA-NJ's own account, there is no existing "subsidy," thus their argument fails completely on its face.

Moreover, it appears that BA-NJ would seek to make up the difference in its margins earned on the Access New Jersey rates from the federal universal service fund. But as noted in our petition, BA-NJ's own estimates of the annual value of the Access New Jersey program pales in comparison to their annual revenues.⁸ However, BA-NJ still seeks to gain even more revenue than it is entitled to from the federal universal service fund by attempting to obtain funding from for the difference between its Access New Jersey rates and its full tariff rate for the services provided. As we noted in the Petition, the FCC has already summarily rejected this proposal from BA-NJ in its Fourth Order ruling, when it stated that "We also note that the universal service discount mechanism is **not** funding the difference between the generally available rates

⁷ Opposition of Bell Atlantic-New Jersey, Inc. To Petition For Expedited Declaratory Ruling, p.5, n.5.

⁸ BA-NJ's own calculation is that Access New Jersey discounts will cost the Company only \$6 million per year for 1998, 1999 and 2000. This is a rather paltry sum considering the enormous financial benefits that BA-NJ has reaped under the alternative regulation in New Jersey, which is several hundred times greater per year than the cost of these discounted services. (See Petition, Attachment 5).

and special school rates, **as suggested by Bell Atlantic**, but is applied to the price at which the service provider agrees to provide the service to eligible schools and libraries.”⁹ The FCC is urged to reaffirm its decision and issue a ruling stating in unmistakable terms that the Access New Jersey rates are not “special regulatory subsidies.”

BA-NJ’s argument that the Access New Jersey rates are “regulatory subsidies” because they were part of a stipulation approved by the Board is similarly flawed in its simplicity. As BA-NJ notes in its comments, the Access New Jersey rates are part of the agreement it entered into voluntarily and willingly for an alternative plan of price-cap regulation. The Access New Jersey rates were never “state-supported” or “state-funded.” As noted in our petition, BA-NJ was required to provide total funding for the benefits provided under the Access New Jersey program. Thus, there is no basis for BA-NJ’s argument that the Access New Jersey rates are “state-supported.”

The Access New Jersey rates are akin to traditional contracts currently offered by BA-NJ to its large customers, and therefore, do not constitute a contract negotiated under “very different conditions” as argued by BA-NJ. As noted in our petition, the Access New Jersey rates provide schools and libraries with the opportunity to take the discounted services offered under the program, however, they are not required to do so. Thus, the Access New Jersey rate is not a pre-existing contract negotiated under different circumstances than normal. The discounts offered to schools and libraries under the Access New Jersey program are no different than the discounts that BA-NJ offers today to individual customers through customer specific pricing arrangements. (See Attachment 1). Perhaps BA-NJ will later argue that the special pricing arrangements for

⁹ Fourth Order at ¶141 (emphasis supplied).

large customers are likewise "special regulatory subsidies" and ask that these "discounts" also be funded out of the federal universal service fund. BA-NJ's logic would appear to compel that anomalous result.

Contrary to BA-NJ's argument, the parties to the Stipulation from which the Access New Jersey rates arose did not agree that these rates would be independent of any discounted rates available under the federal universal service program. BA-NJ refers in its argument to the portion of the Stipulation which preserves the ability of a school or library to obtain the greatest discount available. However, that same provision also expressly preserves the ability of the Ratepayer Advocate to push for additional discounts for schools and libraries above the Access New Jersey rates:

Any discount agreed upon in this Stipulation shall not preclude the Ratepayer Advocate from arguing that an additional discount above that provided for in Section A(2) herein should be funded out of the Universal Service fund and be available to schools and libraries. (Paragraph A2(g))

Thus, there was never any agreement between the parties as alluded to by BA-NJ that there would not be additional discounts above and beyond the Access New Jersey discounts that would be sought for schools and libraries. With respect to this issue, BA-NJ and the Ratepayer Advocate agreed to disagree, which would necessarily require resolution of the conflict by some other authority. However, BA-NJ has summarily decided the issue on its own before any regulatory authority has had an opportunity to address the issue, and foreclosed schools and libraries from receiving available benefits to which they are entitled to in the process.

The need for a speedy decision from the FCC on this issues is shared by other parties as well, as referenced by the comments from AT&T and NJLA. Additionally, comments filed by

NJCTA emphasize the fact that BA-NJ's actions have not only caused confusion for schools and libraries, but also caused difficulty for carriers seeking to offer schools and libraries discounted services under the federal universal service fund. NJCTA's comments correctly point out the inconsistencies stated by a witness for BA-NJ as to how they would use their tariff rates to attempt to gain additional funding from the federal universal service fund. As noted by NJCTA, BA-NJ will attempt to use its tariffed rates for purposes of submitting bids, but would ultimately offer service to schools and libraries at the Access New Jersey rates.¹⁰ Were BA-NJ allowed to circumvent the rulings established by the FCC with regard to carriers seeking funding from the federal universal service fund for discounted services offered to schools and libraries, it would place competing carriers at a competitive disadvantage, as explained by NJCTA. By foreclosing the possibility of other carriers being able to compete, BA-NJ would be ensuring itself a captive market. This certainly was not the intent of the Federal Telecommunications Act of 1996, nor the FCC in implementing its provisions for universal service.

CONCLUSION

The FCC is urged to issue a ruling which will dispel the cloud of confusion that BA-NJ has created through its actions for schools and libraries seeking much needed assistance from discounts for telecommunications services. As noted by the comments of the NJLA, with a new round of funding for the federal universal service fund beginning on July 1, 1998, there is a great deal of urgency for the speedy resolution of this matter so that schools, libraries and carriers can proceed under the program. As referenced in our petition and the above comments, BA-NJ

¹⁰ Comments of NJCTA, p.7.

erroneous interpretations of the FCC's rulings, if allowed to continue, would allow them to circumvent the goals of the federal universal service fund as set forth in the 1996 Telecommunications Act. A ruling from the FCC declaring that BA-NJ's Access New Jersey rates are not special regulatory subsidies, and therefore, constitute the lowest corresponding price for purposes of calculating discounts available under the federal universal service fund is the proper remedy required for resolution of this dilemma.

Respectfully submitted,

BLOSSOM A. PERETZ, ESQ., RATEPAYER ADVOCATE,
NJ DIVISION OF THE RATEPAYER ADVOCATE

By: Lawanda R. Gilbert
Lawanda R. Gilbert, Esq.
Assistant Deputy Ratepayer Advocate

ATTACHMENT 1

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Leigh E. Buggeln
Assistant General Counsel
Legal



April 7, 1998

Secretary
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Re: Customer Specific Pricing Arrangements

Dear Secretary :

Enclosed pursuant to the Board's June 30, 1994 Decision and Order in Docket Nos. TX90050349, TE92111047, and TE93060211 are summaries of new customer specific pricing arrangements.

All of the summaries include the price to be charged, the term of the customer specific pricing arrangement, identification of the services to be provided, and terms and conditions of service that differ from those set forth in Bell Atlantic-New Jersey's tariffs.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Leigh E. Buggeln".
Leigh E. Buggeln

Enclosures

cc: Frederick Pappalardo, Esq.
James H. Laskey, Esq.
Christopher D. Moore, Esq.
Blossom A. Peretz, Esq.
Mr. Michael P. Gallagher

Summary of Customer Specific Pricing Arrangement #80407A

Term of Customer Specific Pricing Arrangement 36 Months

Services Provided: IntraLATA Toll
OutWATS
Local Usage

Price Charged: 16.7% Discount on specified volumes, depending on volume and location, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2-Section A6.2., subject to a minimum annual usage requirement; 0% discount on other specified volumes and an additional maximum discount of \$770 annually upon meeting certain revenue requirements for other Bell Atlantic Services.

22.2% Discount on specified volumes, depending on volume and location, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2-Section A7.1., subject to a minimum annual usage requirement; 0% discount on other specified volumes.

5% Discount on specified volumes, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2- Section A5.2, subject to a minimum annual usage requirement; 0% discount on other specified volumes.

Terms & Conditions That Differ From Tariff

1. The rate is predicated on a service period of thirty-six (36) consecutive months.
2. Termination Charges will apply in the event that the Customer cancels or terminates the services during the service period.
3. Customer is obligated to meet minimum annual usage and billing requirements.
4. Rates are premised on customer's maintaining service mix, usage patterns and other characteristics including maintaining specified usage requirements at two locations.

Summary of Customer Specific Pricing Arrangement #80407B

Term of Customer Specific Pricing Arrangement 36 Months

Services Provided: IntraLATA Toll
 OutWATS
 Local Usage

Price Charged: 16.7% Discount on specified volumes, depending on volume and location, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2-Section A6.2., subject to a minimum annual usage requirement; 0% discount on other specified volumes and an additional maximum discount of \$2,536 annually upon meeting certain revenue requirements for other Bell Atlantic Services.

 16.7% Discount on specified volumes, depending on volume and location, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2-Section A7.1., subject to a minimum annual usage requirement; 0% discount on other specified volumes.

 4% Discount on specified volumes, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2- Section A5.2, subject to a minimum annual usage requirement; 0% discount on other specified volumes.

Terms & Conditions That Differ From Tariff

1. The rate is predicated on a service period of thirty-six (36) consecutive months.
2. Termination Charges will apply in the event that the Customer cancels or terminates the services during the service period.
3. Customer is obligated to meet minimum annual usage and billing requirements, subject to adjustment only under specified circumstances.
4. Rates are premised on customer's maintaining service mix, usage patterns and other characteristics including maintaining specified usage requirements at various locations.

Summary of Customer Specific Pricing Arrangement #80407C

Term of Customer Specific Pricing Arrangement 60 Months

Services Provided: IntraLATA Toll
OutWATS
Local Usage

Price Charged: 16.7% Discount on specified volumes, depending on volume and location, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2-Section A6.2., subject to a minimum annual usage requirement; 0% discount on other specified volumes.

5% Discount on specified volumes, off Standard Rates set forth in Tariff B.P.U.- N.J.- No. 2- Section A5.2, subject to a minimum annual usage requirement; 0% discount on other specified volumes.

Terms & Conditions That Differ From Tariff

1. The rate is predicated on a service period of sixty (60) consecutive months.
2. Termination Charges will apply in the event that the Customer cancels or terminates the services during the service period subject, however, to meeting the provisions of right of first refusal.
3. Customer is obligated to meet minimum annual usage and billing requirements.
4. Rates are premised on customer's maintaining service mix, usage patterns and other characteristics including maintaining specified usage requirements at various locations.